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NO. 53845-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

PATRICK DENNIS,

Appellant.

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RESPONDENT'S BRIEF

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RYAN JURVAKAINEN  
Prosecuting Attorney  
AILA R. WALLACE/WSBA #46898  
Deputy Prosecuting Attorney  
Representing Respondent

HALL OF JUSTICE  
312 SW FIRST  
KELSO, WA 98626  
(360) 577-3080

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court did not err when it found that the warrant application established probable cause because both prongs of the *Aguilar-Spinelli* test were met.
2. The trial court did not err in denying Dennis's request for a *Franks* hearing because, even if the first two prongs of the *Franks* test were met, inclusion of the claimed omitted information would not negate probable cause.

## **II. STATEMENT OF THE CASE**

On January 8, 2019, Michael Hauge reported to law enforcement that Patrick Dennis was living at 1405 17th Avenue #126 and was in possession of illegal drugs. CP 17. Hauge told Detective Durbin that he had gone to the above apartment to pick up his wife and when Dennis opened the door he saw approximately one ounce of heroin and about a quarter-ounce of heroin on the nightstand. *Id.* Hauge explained that he used to sell heroin and used methamphetamine and heroin, so was familiar with what those substances look like. He also demonstrated knowledge of prices for methamphetamine and heroin and of how those substances are packaged for sales. *Id.* Based on this information, Detective Durbin obtained a search warrant for Dennis and both room #120 and room #126. Room #126 is next door to room #120 and detectives observed Dennis go into both rooms multiple times on the day in question. *Id.*

Detective Durbin wrote in his affidavit in support of the search warrant that he was aware of Dennis from previous investigations in which large amounts of methamphetamine and heroin were found in room #120. *Id.* He included Hauge's previous conviction for selling drugs but omitted four felony crimes of dishonesty and one misdemeanor crime of dishonesty. *Id.*, CP 56–7, CP 59.

Upon searching Dennis and the rooms, detectives located approximately 23 grams of suspected heroin in Dennis's pocket and Suboxone strips in room #126. CP 71. Dennis was arrested and charged with two counts of Violation of the Uniform Controlled Substances Act – Possession. CP 3.

Dennis moved to suppress the evidence found during the search, arguing that Hauge's veracity was not established in the warrant affidavit and that Detective Durbin's omission of Hauge's criminal history from the affidavit entitled him to a *Franks* hearing. CP 31–42. The trial court denied the motion to suppress, holding that both prongs of the *Aguilar-Spinelli* test had been met and that, even if a *Franks* hearing were held and the omissions were found to be reckless and material, adding the omitted information into the search warrant affidavit would not negate probable cause. CP 71.

Dennis was found guilty on stipulated facts and now timely appeals. CP 75.

### III. ARGUMENT

#### A. **The trial court did not err when it found that the warrant application established probable cause because both prongs of the *Aguilar-Spinelli* test were met.**

##### 1. *Standard of review*

Article I, section 7 of the Washington Constitution requires that the issuance of a search warrant be based upon a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); CrR 2.3(c). The determination of probable cause must be based on “facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location.” *Vickers*, 148 Wn.2d at 108. Probable cause is established when “an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity.” *Id.*

Whether probable cause is established is a legal conclusion subject to de novo review. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 289 (2007). However, the decision to grant a search warrant is reviewed for abuse of discretion. *Vickers*, 128 Wn.2d at 108. A reviewing court gives

great deference to a magistrate's decision to grant a search warrant and will only disturb that decision if it was an abuse of discretion. *Id.* The issuing magistrate may make reasonable inferences from the facts and circumstances set out in the affidavit. *State v. Emery*, 161 Wn. App. 172, 202, 253 P.3d 413 (2011). Doubts regarding the existence of probable cause are generally resolved in favor of the warrant. *Vickers*, 148 Wn.2d at 108–09.

2. *Both prongs of the Aguilar-Spinelli test were met in this case.*

When evaluating whether an informant's tip created probable cause for the issuance of a search warrant, Washington courts use the two-part *Aguilar-Spinelli* test. First, "the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information." *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984), citing *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509 (1964). This is referred to as the "basis of knowledge" prong of the test. Second, "the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable." *Id.* This is known as the "veracity" prong.

Dennis argues on appeal only that the veracity prong of the *Aguilar-Spinelli* test was not satisfied in the affidavit in support of the search warrant in this case. However, Hauge's reliability and credibility was shown in Detective Durbin's affidavit.

Informants generally fall into one of four categories: (1) an informant who remains completely anonymous to both the police and the magistrate; (2) an informant whose identity is known to the police but not revealed to the magistrate; (3) an informant whose identity, including name and contact information is disclosed to the magistrate; and (4) an eyewitness to a crime who calls police and is not identified because exigent circumstances exist that would make identifying the informant unreasonable. *State v. Ibarra*, 61 Wn. App. 695, 699, 812 P.2d 114 (1991). In this case, Hauge falls into the third category because his name, date of birth, and background information were known to the police and provided to the magistrate who reviewed the warrant affidavit. CP 17, RP 32.

When an informant is an ordinary citizen, as opposed to a criminal or professional informant, and his identity is revealed to the magistrate, the veracity prong is relaxed. This is because such citizens usually will not have a track record of providing tips to law enforcement that can be used to show reliability. *Ibarra*, 61 Wn. App. at 699. Instead, reliability

can be inferred from the details of the affidavit setting forth the basis of knowledge and from the citizen's willingness to come forward. *See State v. Tarter*, 111 Wn. App. 336, 44 P.3d 899 (2002). Additionally, when information is provided by an identified citizen informant, "the danger that the information is merely a casual rumor or the product of an anonymous troublemaker is minimized, and the information is less likely to be colored by self-interest." *Ibarra*, 61 Wn. App. at 699; *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 551 (1978). An informant's willingness to come forward and identify himself to law enforcement and a magistrate is a strong indicator of reliability. *State v. Chenoweth*, 160 Wn.2d 454, 483, 158 P.3d 595 (2007). Such a person can be held accountable for providing false accusations. *Id.*

In *Northness*, a woman contacted law enforcement to report that she lived in an apartment with the defendant and observed marijuana in a hope chest. She gave her name and address to the officer, who included them in an affidavit in support of a search warrant. *Northness*, 20 Wn. App. at 553. She told the officer that she was familiar with marijuana and recognized the substance to be marijuana. *Id.* She also stated that she left the apartment and, upon returning, the marijuana had been moved. The only other information in the warrant affidavit regarding the named informant's reliability was that "She is a local resident who initiated the

contact with your affiant out of a spirit of righteousness, citizenship, and who exhibits a desire to remain law abiding.” *Id.* The Court of Appeals stated that when an informant is an identified, ordinary citizen, “intrinsic indicia of the informant’s reliability may be found in his detailed description of the underlying circumstances of the crime observed or about which he had knowledge.” *Id.* at 549. So, if the underlying circumstances satisfy the knowledge prong of *Aguilar-Spinelli*, they may also provide built-in credibility guides to the informant’s reliability, thereby fulfilling the veracity prong. *Id.* The Court held that the informant’s detailed personal observation of the contraband was sufficient to establish both prongs of the *Aguilar-Spinelli* test.

This case is similar to *Northness*. Here, Hauge is an identified informant who provided sufficient information to satisfy the basis of knowledge prong. Given that the veracity prong is relaxed in cases involving identified informants, the affidavit also shows that Hauge is reliable. The affidavit supplies his name and date of birth and includes the fact of Hauge’s previous conviction for selling controlled substances as well as his previous use of those substances. CP 46. As in *Northness*, the affidavit notes that Hauge called the police because he is a concerned citizen who is offended that the defendant is still selling drugs. *Id.* Because Hauge provided firsthand details and was a named citizen, his

veracity is established and both prongs of the *Aguilar-Spinelli* test have been met.

*Duncan* is distinguishable from this case. First, the informant in *Duncan* provided only her name and that she was the defendant's girlfriend. *State v. Duncan*, 81 Wn. App. 70, 72, 912 P.2d 1090 (1996). Additionally, she lied about her name. Since law enforcement had no other information, they could not and did not confirm her identity. *Id.* at 77. Here, conversely, the informant provided his name and date of birth, as well as information regarding his criminal history. It can further be inferred that law enforcement had Hauge's phone number, since he called into law enforcement. CP 46. Finally, Detective Durbin and Hauge were in contact either in person or via text or email, since Durbin was able to show a photo of the defendant to Hauge. *Id.*; *See State v. Wilke*, 55 Wn. App. 470, 479, 778 P.2d 1054 (1989) (finding anonymous citizen informant's reliability established as the magistrate could infer the police had the name and phone number and knew the informant's identity). There is much more information regarding the informant's reliability in the warrant affidavit in this case than there was in *Duncan*. Therefore, this court should find that Hauge's veracity is established.

Second, the nature of any alleged dispute in this case is vastly different from the dispute present in *Duncan*. There, the informant was

providing information about her boyfriend, who had just assaulted her. *Duncan*, 81 Wn. App. at 73. The court stated that this domestic dispute colored the informant's information with self-interest, presumably because it was a motive for retaliation against the defendant. In this case, even assuming Hauge and his wife had an acrimonious relationship, there is no indication that that would color his information regarding the defendant with self-interest. While the motive to lie or retaliate is obvious in *Duncan*, it is not apparent in this case.

Finally, Dennis argues that Hauge has prior convictions for crimes of dishonesty that were not provided to the magistrate and that would call his reliability into question. While crimes of dishonesty could have an adverse effect on an informant's credibility, that effect must be weighed against the informant's willingness to come forward and identify himself to law enforcement and a judge. *See Northness*, 20 Wn. App. at 557. Voluntarily disclosing background information and one's identity is a strong indicator of reliability. *Chenoweth*, 160 Wn.2d at 483. Any adverse effect of prior convictions also must be balanced against the details provided regarding the informant's basis of knowledge. *See Northness*, 20 Wn. App. at 557–8. Hauge provided specific details regarding what he observed in the defendant's residence. Additionally, Hauge's convictions for crimes of dishonesty are approximately seven

years old or older. CP 56. The misdemeanor conviction is over ten years old. CP 59. Balancing these factors shows that the veracity prong of the *Aguilar-Spinelli* test has been met. Dennis's conviction should be affirmed.

**B. The trial court did not err in denying Dennis's request for a *Franks* hearing because, even if the first two steps of the *Franks* test were met, inclusion of the claimed omitted information would not negate probable cause.**

The United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), provides for a specific procedure to challenge parts of a search warrant predicated on deliberate falsehoods or statements made with reckless disregard for the truth. Under those circumstances, a defendant may challenge those portions of the search warrant which are intentionally false or made with reckless disregard for the truth, excise those parts, and test the sufficiency of the remaining information to establish probable cause. This procedure has also been extended to material omissions of fact. *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980). The test and procedure adopted by the United States Supreme Court is applicable in Washington with respect to both material falsehoods and material omissions of fact. *See, e.g., State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The defendant has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. *Chenoweth*, 160 Wn.2d at 469; *State v. Hashman*, 46 Wn. App. 211, 729 P.2d 651 (1986); *State v. Stephens*, 37 Wn. App. 76, 678 P.2d 832 (1984). If the court determines that the misrepresentation or omission was deliberate or reckless, the next step is to determine whether it was material or relevant to the probable cause determination. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992); *Chenoweth*, 160 Wn.2d at 462. To be material, a fact must be necessary to the finding of probable cause. *State v. Taylor*, 74 Wn. App. 111, 117, 872 P.2d 53 (1994), *citing Garrison*, 118 Wn.2d at 874. Finally, if the court finds that the misrepresented or omitted facts are relevant, the court is to delete the false information or insert the omitted information and determine if the amended affidavit supports probable cause. *Id.* Only if this process is fully undertaken and the court finds that the altered affidavit fails to demonstrate probable cause is the defendant entitled to an evidentiary hearing. *Id.*

The trial court in this case found that there was a reckless omission of material facts because law enforcement had access to Hauge's full criminal history and did not include certain convictions in the warrant affidavit. RP 36–37; CP 70–71. However, Division III of the Washington

Court of Appeals has held that omissions of criminal history or pending charges is not material or misleading. *State v. Lane*, 56 Wn. App. 286, 294, 786 P.2d 277 (1989). In *Lane*, officers obtained a search warrant based on a confidential informant's controlled buy from the defendant. At a suppression hearing, the detective testified that the informant had a prior criminal record that was not provided to the magistrate that approved the search warrant. *Lane*, 56 Wn. App. at 289, 294. The Court of Appeals held that inclusion of the informant's criminal history would not negate probable cause to issue the warrant because it is common that "a person who is in a position to set up a controlled buy often has had prior contacts with the criminal justice system." *Id.* at 295. Therefore, the magistrate was not misled and the information was not material. The Court did not even reach the issue of whether the informant's criminal record was deliberately or recklessly omitted.

This Court should follow Division III and find that inclusion of Hauge's criminal history would not negate probable cause because it is common that individuals involved with or close to drug activity have criminal history. The magistrate was not misled because the information was not material.

However, if this Court agrees with the trial court that the exclusion of Hauge's criminal history was reckless, probable cause is nonetheless

not negated by the inclusion of that information. The third step of a *Franks* analysis is to put the omitted information into the affidavit and determine if the altered affidavit supports probable cause. The trial court in this case properly found that, even considering Hauge's prior convictions for crimes of dishonesty, probable cause was still established by the warrant affidavit because of the age of the convictions. RP 37.

As discussed above, voluntarily disclosing background information and one's identity is a strong indicator of reliability. *Chenoweth*, 160 Wn.2d at 483. Any adverse effect of prior convictions must be balanced against the details provided regarding the informant's basis of knowledge. *See Northness*, 20 Wn. App. at 557–8. Hauge provided many details about what he saw in Dennis's apartment and volunteered information about his own past to support his basis of knowledge. The convictions for crimes of dishonesty are over seven years old. When balanced with the details given to Detective Durbin, the convictions do not negate probable cause to issue the warrant in this case. Therefore, Dennis's conviction should be affirmed.

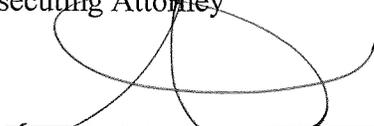
#### **IV. CONCLUSION**

Because the trial court did not err in finding that the warrant application established probable cause or in denying Dennis's request for a

*Franks* hearing, Dennis's conviction for possession of a controlled substance should be affirmed.

Respectfully submitted this 29 day of April, 2020.

Ryan Jurvakainen  
Prosecuting Attorney

By:   
AILA R. WALLACE, WSBA #46898  
Deputy Prosecuting Attorney

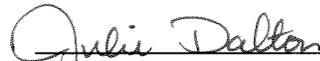
**CERTIFICATE OF SERVICE**

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served RESPONDENT'S BRIEF electronically via the Division II portal:

Marek Falk  
Washington Appellate Project  
1511 3<sup>rd</sup> Ave, Ste 610  
Seattle, WA 98101  
[marek@washapp.org](mailto:marek@washapp.org)  
[wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 4, 2020.

  
\_\_\_\_\_  
Julie Dalton

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

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